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No. 119, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT, *et al.*,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

ANSWER OF DEFENDANT STATE OF NEW HAMPSHIRE

JOHN P. ARNOLD*
Attorney General
HAROLD T. JUDD
Senior Assistant Attorney General
Civil Bureau
25 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658

Of Counsel:
FREDERIC L. HAHN
JOHN L. ROGERS, III
DAVID B. GOROFF
HOPKINS & SUTTER
Three First National Plaza
Suite 4200
Chicago, Illinois 60602
(312) 558-6600

March 24, 1992

* *Counsel of Record*

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ANSWER OF DEFENDANT STATE OF NEW HAMPSHIRE

Defendant State of New Hampshire answers the Complaint of the States of Connecticut and Rhode Island and the Commonwealth of Massachusetts, as follows:

JURISDICTION AND STANDING

Complaint ¶ 1: The exclusive original jurisdiction of this Court is invoked under the Constitution of the United States, art. III, § 2, cl. 1 and 2 ("controversies between two or more States"), and 28 U.S.C. § 1251(a)(1)(1991). Plaintiffs have no other plain, speedy or adequate remedy at law.

ANSWER: Admitted that Plaintiffs seek to invoke this Court's original jurisdiction but denied that this is an appropriate case for the exercise of original jurisdiction and denied that Plaintiffs have standing to complain that the New Hampshire tax on Nuclear Station Property (the "Nuclear Property

Tax") violates any provision of the Constitution or federal law. Further answering, the State of New Hampshire states that the utilities which pay the Nuclear Property Tax have a plain, speedy and adequate remedy under New Hampshire law to challenge the validity of the tax.

Complaint ¶ 2: This action seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201-2202 (1991), that the State of New Hampshire's "Tax on Nuclear Station Property," 1991 N.H. Laws c. 354 (to be codified as New Hampshire Revised Statutes Annotated ("RSA") chapter 83-D) (hereinafter the "Seabrook Tax"), a copy of which is attached hereto as Exhibit A and incorporated herein by reference, violates the rights and protections afforded to plaintiffs by the United States Constitution under art. VI, cl. 2 (Supremacy Clause); art. 1, § 8 (Commerce Clause); the Equal Protection Clause of the Fourteenth Amendment; and art. IV, § 2, cl. 1 (privileges and Immunities Clause). This suit also seeks to enjoin permanently the enforcement of the Seabrook Tax.

ANSWER: Admitted that Paragraph 2 describes the relief Plaintiffs seek in this action.

Complaint ¶ 3: The plaintiffs are the sovereign State of Connecticut, with its capital located in Hartford, Connecticut; the Commonwealth of Massachusetts, with its capital located in Boston, Massachusetts; and the State of Rhode Island, with its capital located in Providence, Rhode Island. Plaintiffs bring this action in their proprietary capacities as substantial purchasers of electricity from owners of the Seabrook Station, the only property to which the Tax on Nuclear Station Property applies. Plaintiffs also bring this

action in their parens patriae or quasi-sovereign capacities, as guardians of the health, welfare, and economic prosperity of the citizens of their states.

ANSWER: Admitted, except that the State of New Hampshire denies that Plaintiffs have standing to bring this action in their proprietary capacities or their *parens patriae* or quasi-sovereign capacities and is without knowledge or information sufficient to form a belief whether Plaintiffs are substantial purchasers of electricity from the utility owners of Seabrook Station.

Complaint ¶ 4: The Defendant is the sovereign State of New Hampshire, with its capital located in Concord, New Hampshire.

ANSWER: Admitted.

THE NEW HAMPSHIRE TAX

Complaint ¶ 5: The Seabrook Tax makes three changes in New Hampshire's tax law. First, it imposes an ad valorem tax upon the value of nuclear station property at the rate of 0.64 percent of valuation to be assessed annually. Chapter 354.1 (H.B. 64, § 1) to be codified as RSA 83-D:1. Second, it amends New Hampshire's Franchise Tax to exclude electric utilities from the definition of "public utility" and exclude sales of electricity from the Franchise Tax's coverage. Chapter 354.3 and 4 (H.B. 64, §§ 3 and 4), amending RSA 83-C:1, II and IV. Third, it allows electric utilities a credit against any liability they have under New Hampshire's Business Profits Tax to the extent of the amount paid by such entities pursuant to the Seabrook Tax. Chapter 354:2 (H.B. 64 § 2), amending RSA 77-A:5.

ANSWER: Denied that Chapter 83-D in the N.H. Rev. Stat. Ann., entitled "Tax On Nuclear Station Property," does anything other than establish a tax on Nuclear Station Property at the rate of 0.64 percent of the valuation of such property, to be assessed annually. Other sections of H.B. 64 amend different provisions of New Hampshire tax law and these sections are separate actions of the legislature and are not part of the "Tax on Nuclear Station Property." Admitted that these other changes include the repeal of the Franchise Tax as applied to electric utilities, described in the third sentence of paragraph 5 of the Complaint, and the addition of a new paragraph VI in the list of credits against the Business Profits Tax, in this case for the amount of Nuclear Property Tax paid by *any* utility, whether or not located in New Hampshire.

Complaint ¶ 6: There is only one nuclear power station in New Hampshire, the Seabrook Station, and therefore only one property subject to the Seabrook Tax.

ANSWER: Admitted.

Complaint ¶ 7: Seabrook Station is jointly owned by utilities and municipal electric cooperatives located in, or selling electricity directly or indirectly to consumers located in, the States of New Hampshire, Connecticut, Massachusetts, Rhode Island, and Vermont. Public Service Company of New Hampshire ("PSNH"), an electric utility located in New Hampshire, and making retail sales of electricity to New Hampshire customers, is the single largest owner of Seabrook Station, with a 35.6 percent share. Other New Hampshire utilities own a total of 2.17 percent of Seabrook Station. The United Illuminating Company and the Connecticut Light and Power Company, which are utilities located in Connecticut, and making retail sales of electricity exclusively to Connecticut customers, own 17.5 percent and 4.06 percent, respectively, of Seabrook Station. Utilities located within and/or selling electricity at retail to Massachusetts consumers own a total of 28.06 percent of Seabrook Station. Specifically, Massachusetts Municipal Wholesale Electric Cooperative owns 11.6 percent, New England Power Company owns 10 percent, Canal Electric Company owns 3.5 percent, Montaup Electric Company owns 2.9 percent, Taunton Municipal Lighting Plant owns 0.1 percent, and Hudson Light & Power owns 0.07 percent of Seabrook Station. EUA Power owns 12.13 percent of Seabrook. Although EUA Power is a New Hampshire corporation, it is strictly a wholesale generation company with no retail customers in New Hampshire. Utilities located in the State of Vermont own the remaining 0.41% share.

Each of the Seabrook joint owners is engaged at the Seabrook Station in the generation or transmission of electricity in interstate commerce. The Federal Energy Regulatory Commission (FERC) regulates the wholesale sale of electricity between some of the Seabrook joint owners and their retail subsidiaries or other utilities. State regulatory authorities regulate certain retail sales of electricity by some of the joint owners.

ANSWER: Admitted as to the ownership interests, except that, in addition to the 35.6% interest of Seabrook Station's largest owner, Public Service of New Hampshire, other New Hampshire utilities (which include EUA Power) own 14.3% of the facility, making the ownership interest of New Hampshire utilities approximately 49.9%. Admitted that the remaining utilities mentioned in Paragraph 7 of the Complaint have the

approximate ownership interests alleged and have retail customers in Connecticut and Massachusetts as alleged, but the State of New Hampshire is without knowledge or information sufficient to form a belief concerning the ultimate destination of each utility's share of the electricity generated at Seabrook, which may be sold and delivered to other utilities and their retail customers in other states, including New Hampshire. Additionally, the State of New Hampshire qualifies its answer with respect to the percentage interest of New England Power Company in that New England Power Company owns (and allocates a percentage of all of its expenses including the Nuclear Property Tax, to) a New Hampshire corporation, Granite State Electric Company serving retail customers in New Hampshire. Further answering, the State of New Hampshire states that utilities in plaintiff State of Connecticut own a total interest in Seabrook Station of only 21.56% and utilities in plaintiff Commonwealth of Massachusetts own, at most, only a 28.06% interest. Utilities in plaintiff State of Rhode Island and Providence Plantations own no interest in Seabrook Station. After allocating to Granite State Electric Company its proportionate share of New England Power Company's ownership interest in Seabrook, the State of New Hampshire is informed and believes that New Hampshire utilities are responsible for in excess of 50% of Seabrook costs, including the Nuclear Property Tax. With respect to the last paragraph of paragraph 7, the State of New Hampshire admits that some of the joint owners of Seabrook are engaged in the generation and transmission of electricity in interstate commerce, but denies that all of the electricity enters interstate commerce. The State of New Hampshire admits the remaining allegations in the last paragraph of paragraph 7.

Complaint ¶ 8: The Seabrook Tax is imposed upon each entity with an ownership interest in Seabrook Station in the same proportion as that entity's ownership interest bears to the entirety of the total ownership of Seabrook Station property.

ANSWER: Admitted.

Complaint ¶ 9: For 1991 the Seabrook Tax requires that Seabrook Station be valued at no more than $3,500,000,000 and that estimated tax payments be based on a valuation of $3,500,000,000. Based on this statutory valuation, the total liability to be paid to New Hampshire by the owners of Seabrook Station is $22,400,000 annually. For 1991, the tax is deemed to have been assessed as of April 1, 1991, with the first estimated tax payment due on September 15, 1991.

ANSWER: Admitted.

Complaint ¶ 10: Prior to its amendment by the Seabrook Tax to exclude electric utilities, the New Hampshire Franchise Tax (hereinafter "Franchise Tax"), RSA 83-C:1 et seq., had been imposed on public utilities at the rate of 1 percent of all gross receipts from the sale of gas or electricity within the State of New Hampshire pursuant to franchises granted by the state, generating approximately $6 million in tax revenue annually from New Hampshire corporations. Prior to the enactment of the Seabrook Tax, the Franchise Tax applied to the New Hampshire owners of Seabrook Station, but not to the owners selling electricity exclusively to out-of-state customers, since only the New Hampshire utilities received receipts from the sale of electricity pursuant to franchises granted by the State of New Hampshire. The Seabrook Tax

wholly eliminated the previously existing liability of New Hampshire electric utilities to pay the Franchise Tax.

ANSWER: Denied that the "Seabrook Tax" eliminated New Hampshire's franchise tax as applied to electric utilities. The Franchise Tax as applied to electric utilities was eliminated by H.B. 64, Chapter 354:3 entitled "Franchise Tax; Public Utility Redefined," and not by any provision of the Nuclear Property Tax. Admitted as to the remaining allegations.

Complaint ¶ 11: Public Service of New Hampshire, the primary provider of electricity for New Hampshire, has been and continues to be subject to the New Hampshire Business Profits Tax. RSA 77-A:5. Part of the legislation creating the Seabrook Tax provides a dollar for dollar credit to be applied against this unrelated Business Profits Tax.

ANSWER: Admitted, except that it is denied that Public Service of New Hampshire has for the last several years paid any Business Profits Tax to the State of New Hampshire because, as a result of the utility's poor financial health, as well as its separate deductions and credits, not including the Nuclear Property Tax credit, the utility, although nominally "subject to" the Business Profits Tax as alleged in paragraph 11, has had and will have no liability to pay any such tax. The State is without knowledge or information sufficient to form a belief as to the likelihood that Public Service Company of New Hampshire will, for reasons unrelated to the Nuclear Property Tax credit, pay the Business Profits Tax in the future. As a result, the State of New Hampshire is unable to state that Public Service Company of New Hampshire will receive the benefit from the dollar-for-dollar Nuclear Property Tax credit

against the Business Profits Tax that is enjoyed by the utilities from Connecticut and the Commonwealth of Massachusetts.

THE PURPOSE AND EFFECT OF THE SEABROOK TAX

Complaint ¶ 12: The stated legislative purpose of the Seabrook Tax is to establish nuclear station property as "a distinct class of property," based upon findings that it is "the only property in the state that generates electricity from the fission of atoms," that such generation "imposes unique responsibilities on the state," that a nuclear generating station "creates special and unique public safety requirements and burdens" and "has a unique and lasting impact on the environment which creates burdens" on the state, and that taxation of such class of property is appropriate "to help defray the public charges of government." Chapter 354:1 (H.B. 64 § 1) (RSA 83-D:1).

ANSWER: Admitted that the stated and actual legislative purposes of the Nuclear Property Tax are those described in paragraph 12 of the Complaint.

Complaint ¶ 13: Contrary to the expressed legislative finding, the Seabrook Tax is not necessary "to help defray" any governmental costs related to the presence of Seabrook Station in New Hampshire because all the specific costs attributable to nuclear generating stations, as compared to non-nuclear generating stations, with respect to environmental compliance, emergency planning, liability insurance, and decommissioning are already the responsibility of, and paid by, the owners of Seabrook Station pursuant to federal

and New Hampshire law and regulations which pre-exist and are distinct from the Seabrook Tax.

ANSWER: Denied, except that it is admitted that certain risks and costs associated with the presence of Seabrook Station in New Hampshire are the subjects of specific plans and funds administered by State and Federal authorities and that the owners of Seabrook Station make the payments required by these specific programs.

Complaint ¶ 14: The legislative history of the Seabrook Tax indicates that the actual purpose of the Seabrook Tax is to raise additional revenues for the State of New Hampshire derived almost entirely from the owners of Seabrook Station which make retail sales of electricity to out-of-state consumers, and ultimately from those consumers themselves.

ANSWER: Denied.

Complaint ¶ 15: New Hampshire utilities selling electricity to New Hampshire consumers will pay at most a *de minimis* portion of the Seabrook Tax because of the exemption from the Franchise Tax and a dollar for dollar credit against the Business Profits Tax, while the owners of Seabrook which make retail sales of electricity to out-of-state consumers will bear the full burden of the tax.

ANSWER: Denied.

Complaint ¶ 16: The State of Connecticut, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased

from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 16 of the Complaint.

Complaint ¶ 17: Virtually all of the citizens of Connecticut are consumers of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 17 of the Complaint.

Complaint ¶ 18: The Commonwealth of Massachusetts, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 18 of the Complaint.

Complaint ¶ 19: The vast majority of the citizens of the Commonwealth of Massachusetts are consumers of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 19 of the Complaint.

> **Complaint ¶ 20:** The State of Rhode Island, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased, directly or indirectly, from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 20 of the Complaint.

> **Complaint ¶ 21**: Virtually all of the citizens of the State of Rhode Island are consumers of electricity purchased directly or indirectly from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 21 of the Complaint.

> **Complaint ¶ 22**: The cost of the Seabrook Tax will be passed on to customers of these utilities, including the States of Connecticut and Rhode Island and the Commonwealth of Massachusetts and their citizens as consumers of substantial amounts of electricity, in the form of higher rates, and will impose economic hardships and burdens directly on the plaintiff States and their citizens.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 22 of the Complaint. Further answering, the State of New Hampshire states that, even if the utility owners of Seabrook Station make application to appropriate regulatory bodies in the States of Connecticut and Rhode Island and the Commonwealth of Massachusetts to increase rates for consumers of electricity as a result of the passage of the Nuclear Property Tax and even if such bodies approve an increase in rates, the resulting increase in rates for any consumer in such States and Commonwealth would be negligible and would not impose an economic burden or hardship on the plaintiff states or their citizens, each of whom benefits substantially from the willingness of the citizens of New Hampshire to bear the special burdens, risks and expenses associated with the presence of Seabrook Station in New Hampshire.

> **Complaint ¶ 23**: The total direct economic cost of the Seabrook Tax on plaintiff States, their instrumentalities, and their citizens is estimated to be approximately $14,000,000 during the first year of the tax and over $500,000,000 over the life of Seabrook Station.

ANSWER: Admitted that approximately 50% of the Nuclear Property Tax will be paid by utilities organized under the laws of states other than New Hampshire and that, based on an estimated $22.4 million of total annual Nuclear Property Tax payments for the first year in which the tax is applicable, such out-of-state utilities will pay approximately $11.2 million of the tax. The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 23 of the Complaint concerning the dollar amount of Nuclear Property Tax payments during the life of Seabrook Station.

FIRST CAUSE OF ACTION

Complaint ¶ 24: The plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 23 of the Complaint as its answers to the allegations contained in paragraph 24.

Complaint ¶ 25: The Seabrook Tax is in conflict with and repugnant to federal law and is accordingly void under the Supremacy Clause, art. VI of the United States Constitution.

ANSWER: Denied.

Complaint ¶ 26: The Seabrook Tax is a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. As such, the tax is in conflict with the Tax Reform Act of 1976, Pub. L. 94-455, § 212(a) 90 Stat. 1914, codified at 15 U.S.C. § 391 which provides:

> **Tax on or with respect to generation or transmission of electricity**
>
> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.
>
> The greatly disproportionate burden borne ultimately by non-New Hampshire consumers is a discrimination which is barred by Congress under this federal law.

ANSWER: Denied,except that it is admitted that 15 U.S.C. § 391 contains the language quoted in paragraph 26 of the Complaint.

SECOND CAUSE OF ACTION

Complaint ¶ 27: Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 23 of the Complaint as its answers to the allegations contained in paragraph 27.

Complaint ¶ 28: The generation and sale of electricity are commercial activities in interstate commerce.

ANSWER: Admitted that the generation and sale of electricity *in interstate commerce* are "commercial activities in interstate commerce" as alleged in paragraph 28, but denied that all generation and sale of electricity takes place in or involves interstate commerce.

Complaint ¶ 29: The Seabrook Tax constitutes an unreasonable, unlawful and prohibited burden on interstate commerce, in contravention of art. 1, § 8, cl. 3 of the United States Constitution (Commerce Clause) in that:

A. The Seabrook Tax along with the concurrently enacted credits to another New Hampshire tax and the repeal of the New Hampshire Franchise Tax on electric utilities discriminates against the utilities which are part owners of Seabrook and which sell electricity at retail to non-New Hampshire customers. The burden of this tax will ultimately be borne disproportionately by non-New Hampshire consumers, and thus this tax will provide substantial and direct commercial advantage to local businesses and consumers.

B. The Seabrook Tax is not a property tax to be borne proportionately by the owners of the taxable property. Through the utilization of the credit provision for the New Hampshire Business Profits Tax and the repeal of the New Hampshire Franchise Tax on electric utilities, the Seabrook Tax is unfairly and therefore unconstitutionally apportioned.

C. The Seabrook Tax is not fairly related to the services provided by New Hampshire. The stated legislative purpose of the Seabrook Tax (RSA 83-D:1) does not justify the tax. Under New Hampshire and federal law, all of the costs of environmental compliance, emergency planning, liability insurance, and decommissioning have been accounted for by the owner-operators of the Seabrook plant. The Seabrook Tax cannot be justified for these purposes and is not fairly related to any benefits provided the taxpayer.

ANSWER: Denied.

THIRD CAUSE OF ACTION

Complaint ¶ 30: The plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 23 of the Complaint as its answers to the allegations contained in paragraph 30.

Complaint ¶ 31: The Seabrook Tax deprives the plaintiffs and their citizens of the equal protection of the law as guaranteed under the Fourteenth Amendment to the United States Constitution.

ANSWER: Denied.

Complaint ¶ 32: There is no rational basis for the classification established by the Seabrook Tax which results in preferential tax treatment for New Hampshire electric utilities selling electricity at retail to New Hampshire customers, and benefits for New Hampshire citizens at the expense of the plaintiff States and its citizens.

ANSWER: Denied.

FOURTH CAUSE OF ACTION

Complaint ¶ 33: Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 23 of the Complaint as its answers to the allegations contained in paragraph 33.

> **Complaint ¶ 34**: The Seabrook Tax contravenes and violates art. IV, § 2, cl. 1 (the Privileges and Immunities Clause of the United States Constitution) which provides in pertinent part that:
>
> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

ANSWER: Denied.

> **Complaint ¶ 35**: The enactment of the Seabrook Tax, along with the elimination of the New Hampshire Franchise Tax on electric companies and allowance of any payment made pursuant to this tax as a credit against another New Hampshire tax, creates significant benefits for the citizens of New Hampshire, while treating non-New Hampshire ratepayers and citizens substantially different.

ANSWER: Denied.

FIRST AFFIRMATIVE DEFENSE

ORIGINAL JURISDICTION

This is an inappropriate case for the exercise of this Court's original jurisdiction.

SECOND AFFIRMATIVE DEFENSE

LACK OF STANDING

Plaintiffs lack standing to assert the claims set forth in the Complaint.

THIRD AFFIRMATIVE DEFENSE

FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Plaintiffs have failed to state a claim upon which relief may be granted, because:

1. The Nuclear Property Tax is an *ad valorem* tax on property permanently located in the State of New Hampshire assessed at the same rate against each owner of the property, regardless of the state in which the owner is organized. Such a real property tax does not constitute a burden on interstate commerce or a violation of any other provision of the constitution or federal law under any of the standards applied by this Court to evaluate state taxes.

2. Plaintiffs have no constitutional right to require the State of New Hampshire to reenact a franchise tax on New Hampshire electric utilities and the elimination of this tax and the enactment of an evenhanded tax on real property located in the State is not discriminatory.

3. The credit against New Hampshire's Business Profits Tax for amounts paid under the Nuclear Property Tax is available to all of the utility owners of Seabrook Station, regardless of the state in which they are organized, and the provision for such a credit does not render the Nuclear Property Tax discriminatory. Although further inquiry into the precise effect of the credit on each utility's Business Profits Tax liability is not appropriate when assessing

the constitutionality of a statute which imposes a fairly apportioned real property tax with a nondiscriminatory credit. The actual immediate effect of the credit will be to benefit out-of-state utilities — not New Hampshire utilities — because the New Hampshire owners of Seabrook Station have not been paying Business Profits Taxes and it is unknown when, if ever, they will pay the tax in the future and, unlike the out-of-state utilities, will therefore be unable to use the Nuclear Property Credit.

4. The Nuclear Property Tax is fairly related to the services provided by New Hampshire as that standard has been applied by this Court to state taxes challenged under the commerce clause because the measure of the tax (the value of property in New Hampshire) is reasonably related to the extent of contact each of the utilities has with the State of New Hampshire. Moreover, even though the Nuclear Property Tax is a general revenue tax, rather than a user fee for some specific facility or service provided by the State — making a factual inquiry into the extent of State services provided inappropriate in this case — the presence of Seabrook Station in New Hampshire and the unique burdens, costs and risks it presents for the State would support a factual conclusion that the tax is fairly related to the services provided by, and the burdens imposed on, New Hampshire.

5. The Nuclear Property Tax is not a tax on the generation or transmission of electricity; it is not based on the amount of electricity generated or transmitted; it does not fluctuate with variations in the electrical output of the plant; it is not suspended when the plant ceases operation (as it must for refueling and other contingencies) and the provisions of 15 U.S.C. §391 are therefore inapplicable. Even if 15 U.S.C. §391 were applicable, the Nuclear Property Tax would not violate its terms because, for the reasons described in subparagraphs 1 through 3, the tax does not discriminate

against out-of-State interests.

6. Because the Nuclear Property Tax on its face and in application is a nondiscriminatory property tax, it does not violate the equal protection or privilege and immunities clauses of the United States Constitution.

THEREFORE, defendant State of New Hampshire respectfully requests that the Court dismiss the Complaint or enter judgment in its favor and against plaintiffs and award it such other relief as may be appropriate.

Respectfully submitted,

JOHN P. ARNOLD*
Attorney General
HAROLD T. JUDD
Senior Assistant Attorney General
Civil Bureau
25 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658

Of Counsel:
FREDERIC L. HAHN
JOHN L. ROGERS, III
DAVID B. GOROFF
HOPKINS & SUTTER
Three First National Plaza
Suite 4200
Chicago, Illinois 60602
(312) 558-6600

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* *Counsel of Record*